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Charles Hinkson v. Carmin C. Bonanni : Brief of Respondent

Utah Supreme Court

White, Wright & Arnovitz; Alvin I. Smith; Attorneys for Respondent;

7210

In the Supreme Court

of the

State of Utah

CHARLES HINKSON,

Respondent,

— vs. —

CARMIN C. BONANNI,

Appellant.

Respondent's Brief

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RESPONDENT'S BRIEF

Respondent agrees with the statement of the case as set forth in appellant's brief with the exception of his statement concerning the second cause of action. In the second cause of action respondent's claim was not based upon,

"A commission of 80% of the sales price on alleged sales of Christmas merchandise"

but was based on 80% of the premium sales price, that is, the difference between the standard price and a premium price for immediate delivery plus a commission of 5% on the standard price.

STATEMENT OF FACTS

It will serve no useful purpose to summarize the facts as stated in the brief of appellant which takes the form of copying the record. There is no dispute concerning the following facts:

1. During the period in question William W. Barton was sales manager of appellant company and as sales manager was authorized to contact and employ other salesmen on commission.

2. Barton in the course of his employment was authorized by appellant to employ respondent as a salesman. (Tr. 73)

3. The respondent was employed as a salesman by appellant (question and answer to interrogatory no. 10 of deposition and Tr. 156, 157).

4. Orders taken by respondent in the course of employment which continued for approximately 10 weeks were filled by appellant.

5. Some commissions on orders taken were paid by appellant to respondent.

QUESTIONS INVOLVED

It is the position of Respondent the Court by its judgment in effect granted respondent's motion to strike that part of the deposition which was based upon the business practice and customary procedure of the appellant. The motion to strike was made at the proper time and the Court at the conclusion of the case stated:

> "The court will consider that and leave that motion under advisement pending the determination of the case." (Tr. 203)

In rendering judgment for respondent we assume that the Court granted respondent's motion and excluded this evidence; however, if there be any ambiguity respondent hereby cross assigns as error the Court's denial of the motion.

Respondent's main argument will be in reply to the three questions raised by appellant and will take the following form:

1. There was no error in admitting the testimony of respondent since all statements were made in the scope of the agency and were corroborated by other testimonies and facts.

2. Substantial evidence adduced at the trial supports findings of fact number 3 of the first cause of action in support of the judgment.

3. Substantial evidence adduced at the trial supports the finding of facts number 2 of the second cause

of action in support of the judgment.

ARGUMENT

1. THERE WAS NO ERROR IN ADMITTING THE TESTIMONY OF RESPONDENT.

It is the opinion of respondent that appellant has confused the law in respect to the admission of the testimony of statements of an agent. The question here is not whether Barton was an agent of the appellant and whether testimony of his statements should be admitted to prove this agency. There has been no denial that Barton was the agent. By the admission and testimony of the principal Barton was a sales manager authorized to employ salesmen and in the course of his employment employed appellant. There was no objection to the admissions of appellant that Barton was an agent and once having proved this agency the remaining questions were:

1. Did Barton make the statements as an agent?

2. In making such statements was he acting within the scope of his authority?

In 2 Corp. Jur. 940, it is stated:

> "Where the agency has been established by independent evidence, the declarations of the agent are competent to show that he acted as agent and not on his individual account, or to show the nature and extent of his authority,"

Here the statements made in the preliminary con-

versation and later by Mr. Barton by telephone were not introduced for the purpose of establishing an agency but were for the purpose of showing the contract terms, of proving the offer of employment, the acceptance of the offer by the appellant, and the subsequent ratification of the contract after respondent affirmed the contract of employment as he was given to understand it had been agreed upon.

We, therefore, submit that the following statement of the Law as found in Restatement of Law of Agency, section 284, volume 2, page 637 applies:

> "In actions between the principal and third parties, evidence of a statement by an agent is admissable for or against either party for the purpose of proving that such statement was made, if the fact that the statement was made constitutes, or is relevant in the proof of, one of the alternate facts to be established in order to maintain a cause of action or difference"

And as found in section 289, page 251:

> "Evidence of statements of agents whether or not such statements are authorized, is admissable in favor of and against the principal, if admissable under the general rules of evidence as to the admissability of such statements by such persons not agents."

For the sake of argument, if we assume that Barton had instructions from his principal as to his limitations in hiring new salesmen, there is no rule of evidence prohibiting the introduction of testimony con-

cerning statements made by such an agent which might have exceeded such authority. Such a rule of law would defeat any claim whatsoever against a principal if the agent had exceeded his authority, and the principal could thereby absolve himself of any liability by drawing up a strict limitation on the agent's authority, which limitations would not be known by the third party.

From the evidence it is apparent that Barton was clothed with general authority and was in no way a limited agent. He was sales manager in charge of all salesmen of the company, had authority to employ new salesmen, in the scope of this authority he had hired many salesmen, had run an advertisement in a Salt Lake newspaper for the purpose of securing salesmen, had interviewed six salesmen, had employed respondent, had given respondent a four-day traning course, had supplied respondent with order books, samples, stationery, and later, credit rating information and had even after the termination of the employment attempted to employ respondent as District Supervisor. We submit that, in the first place, all of these facts conclusively prove that there was corroboration of the authority of Barton as an agent, and secondly they would be an indication to any reasonable person dealing with him that he had unlimited authority to employ salesmen in accordance with the statements and promises he made as an inducement to any salesmen he was attempting to employ.

In admitting the statements of the agent the lower

court was not in error but was following the law as adopted in this state by this court. The statements of the agent were admissable for the purpose of proving the contract and were necessary in order to establish a cause of action against the principal respondent. To have excluded this evidence on the ground that the statement went beyond his authority would have been in conflict with the rule of law as stated in the case of Harrison vs. Auto Securities Co. et al. 70 Utah 11, 257 Pac. 677:

> "It is the general principle of the law of agency, running through on contracts made by the agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of authority of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties, who have dealt with those agents in good faith. That general principle of agency is universally recognized and applied by the Courts, and is laid down by every text-writer who has written upon the subject of agency."

It is true that the principal testified in his deposition that the agent had specific and limited authority, but according to the testimony Barton did not testify that he had at any time told respondent that he was limited in his authority.

The rules as set forth in Dohrman Supply Co. vs. Beau Brummell, 99 Utah 188, 103 Pac. (2nd) 360 and Vadner vs. Rozzelle, 88 Utah 162, 45 Pac. (2nd) 561, do

not apply because in those cases the third party knew he was dealing with a special agent with limited authority. Here the third party had a right to rely on statements made by the agent because they were within the apparent authority of the agent. Certainly an agent empowered to employ a salesman on commission would be authorized to set the rate of commission; likewise it would be within his apparent authority to designate the territory the salesman was to work in, and the type of customers he was to sell. All of these acts are within the apparent authority conferred upon an agent as that term has been defined in the concurring opinion of Justice Wolfe in the case of Skerl vs. Willow Creek Coal Company, 92 Utah 474, 69 Pacific (2nd) 507.

> "Apparent authority must be "apparent"; that is, the act in question which is done by the agent must be such an one which would seem to be within the purview of his actual authority. * * In other words, the work which the agent is really authorized to do must be such that the act which he does and in regard to which his authority is in question or reasonably connected with that work or authority which he actually has or he cannot be apparently authorized."

Evidently the lower court was of the opinion in answer to appellant's plea to sympathy on page 32 of his brief that a principal is in a position to protect himself under the circumstances related therein. It would have been a simple matter for either the principal or agent to have insisted that as a condition to the em-

ployment of respondent he must sign a contract similar to exhibit 8. This principal on the contrary made it possible for an agent to hold out any type of inducement to prospective salesmen and then employ such salesmen to their detriment. The evidence was that no contract was signed or received by the principal, yet the agent was considered to have been employed on September 16th, and not until two months later was there any indication that the principal would not perform in accordance with the terms of employment as previously stated by the agent. The authorities are unanimous that any principal that clothes such an agent with such authority and does not act to rescind such authority but on the contrary in effect ratifies the acts of the agent is bound by the acts of the agent.

2. SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL SUPPORTS FINDING OF FACTS NO. 3 OF THE FIRST CAUSE OF ACTION IN SUPPORT OF THE JUDGMENT.

Counsel for appellant has apparently conceded that they are bound by the following rule set forth in Jensen vs. Logan City, 96 Utah 53, 83 Pacific (2nd) 311:

> "The rule is well established that it is not for this Court in a law case to weigh evidence or determine credibility of witnesses. If there is any substantial evidence in support of findings it must be sustained."

We submit that the testimony of respondent clearly

established a contract of employment which authorized respondent to pass upon credit after he had made an investigation of the credit responsibility of prospective customers. It is true appellant had the right to reject the order if the respondent had not offered credit according to the instructions or the appellant had received outside information that the customer was not a good credit risk. In other words there was substantial evidence adduced at the trial that respondent was to determine the credit risk and appellant merely had the right to reject the order upon substantiation of poor credit. (Tr. 98 and 99, 122)

There is no conflict in the evidence that respondent at all times followed the instructions as given to him by Mr. Barton in respect to credit.

> Q. "Were all orders you secured from the Company in accordance with general instructions and the agreement you had with Mr. Barton?
>
> A. Yes, Sir." (Tr. 99)

Furthermore the evidence was not controverted that Barton led the respondent to believe that if he followed the credit instructions, accepted orders, that the orders would be filled unless there was justification for credit reasons not to fill the order.

> Q. "As a matter of practice you assumed that you would receive commission only on orders filled, didn't you?
>
> A. I assumed all orders would be filled or sub-

stantial reason for credit given why not filled.

Q. The reason you were complaining was you had had orders turned down and no reasons stated at all?

A. Not a reason at all, I had wanted specific accountability." (Tr. 129)

On December 6th when respondent received Exhibit 7, there had been no disagreement on this phase of the contract; one order was cancelled because of a poor report from Dun & Bradstreet (Order #0841). No claim has been made for a commission on this order. No complete accounting was tendered to respondent until the time of the trial when Exhibit 1 was submitted as part of the deposition. If we examine this exhibit we at once recognize the fallacy of the argument of appellant. This is not a case where the salesman sold every prospective customer regardless of his credit standing. He went to great lengths to sell only those accounts which would be suitable dealers in the future and had established credit. Of the some $38,000.00 in orders taken, according to the account of appellant, they had justification for refusing only five accounts totaling $2,514.97, of which amount $1,024.50 was one account. Even on these accounts, which appellant claims were not good credit risks, no testimony was adduced to the effect that these accounts did not maintain the standards specified by Mr. Barton nor has appellant at any time substantiated his reasons for denying the

account credit. In most of these cases the major part of the order was filled but for some unexplainable reason the balance of the order was not accepted on the grounds that the customer was a good credit risk up to a certain point, but not beyond—the point of difference being only $100.00 or $200.00.

We, therefore, submit that there is ample evidence in the record to sustain the lower Court's finding on this point.

3. SUBSTANTIAL EVIDENCE ADDUCED AT THE TRIAL SUPPORTS THE FINDING OF FACTS NUMBER 2 OF THE SECOND CAUSE OF ACTION IN SUPPORT OF THE JUDGMENT.

We would be inclined to agree with counsel for appellant that respondent's claim in his second cause of action would be, "preposterous on its face", if the claim were made as set forth by appellant. No claim has been made, or is now made, that respondent is entitled to an 80 per cent commission on the premium sales, that is, sales of hosiery made at a price in excess of the standard price. So that there will be no further misunderstanding in regard to these premium sales we shall take liberty of summarizing the testimony as found in the record in regard to these sales.

Just before Christmas when the demand for hosiery is greater than at any other time and the supply is somewhat curtailed the retail merchant is willing to pay a premium for delivery of a shipment over and above

his ordinary quota if the shipment is made immediately. According to the testimony Mr. Barton authorized respondent to charge certain select customers one or two dollars more as a premium or as "an overage fee". It had been agreed upon between appellant's agent and respondent that respondent was to receive his 5 per cent commission on the normal price of such sales and was to receive in addition 80 per cent of the overage. Thus, if the salesman was successful in selling a dozen hose originally priced at $16.20 per dozen for $18.70, a dozen for $13.90 originally priced at $12.90, and a dozen for $11.75 originally priced at $10.75, he was to receive not only 5 per cent on the original price, but 80 per cent of $2.50, $1.00, and $1.00, the premium or overage on each sale.

We submit that if appellant's counsel will re-study the transcript, he will have a more accurate understanding of this phase of the case. See particularly page 99.

In response to demand for a bill of particulars plaintiff filed a statement of his account (Tr. 23, 24). In the second column of figures there has been segregated the overage fee on every order submitted. Exhibits D and E were introduced to prove this bill of particulars and as examples of the orders sent in by respondent and accepted by appellant. Included in these orders were premium sales totaling $36.00 on Exhibit D and $21.00 on exhibit E. According to exhibit 7 of appellant all but $35.25 (or three dozen hose) of the order

represented by exhibit D was accepted and the entire order represented by exhibit E was accepted including the premium price charges of $18.70, $13.90, and $11.75.

At the trial the Court was not inclined to have respondent go through every order taken at a price above the normal price to prove that appellant had knowledge of this premium sales agreement, and had accepted the orders after receiving the proof of the excess price charged. Since there was substantial evidence sufficient to convince the Court that there was a contract agreed upon between Barton and respondent, that orders were taken pursuant to such contract, and the orders were accepted and some were filled, the Court felt justified in making a finding of fact in accordance with the complaint and bill of particulars.

It is true that the evidence indicates respondent requested a confirmation from the principal of this agreement; however, according to the evidence there was a contract and he merely wanted the principal to confirm it before he expanded any more time and money in making such sales. In such a case as this we believe the rule adopted under similar facts in the case of Peoples' Mercantile Company vs. Farmers' Cotton Finance Corp., 38 N. M. 237, 31 Pac. (2nd) 252 applies. There the fact that an agent stated that he could not agree to commissions without consulting the principal,

> "might well have been interpreted as a device to "stall", quite common in bargaining processes. Defendant, having conferred ostensible authority

upon his agent and placed him in a position to mislead the plaintiff as to his authority, cannot thus escape responsibility for plaintiff's having been misled. See Restatement, Agency, 170."

The record indicates that there was an agreement for commission to be paid of 80 per cent, and orders were taken and accepted pursuant to this agreement. The only thing that the respondent felt was in view of the fact that he had not been credited with his commission of 80 per cent on the first accounting submitted he was entitled to confirmation from the principal. Although there is no proof that the principal confirmed this agreement, the record is clear that appellant benefited by receiving 95 per cent of the overage, which benefit he is attempting to retain on the grounds that no contract whatsoever was made in respect to this overage. If, as claimed, there were no contract, there was a duty on the appellant to rescind the agreement or at least to advise respondent that the company would refuse to fill the orders at a premium price.

4. ALL EVIDENCE CONCERNING APPELLANT'S BUSINESS PRACTICES AND CUSTOMARY PROCEDURES SHOULD HAVE BEEN EXCLUDED.

During the trial the defendant attempted to introduce evidence as to his practice in employing other salesmen, the commissions they were paid, their limitations on accepting credit and the quota of orders they could accept. Objections were timely made to the intro-

duction of such evidence and for the most part the Court excluded this type of testimony; however, the Court did not rule upon plaintiff's motion to strike that part of the deposition which was objectionable on this count. Accordingly appellant has based much of his argument on the premise that all of this evidence is admissable.

We submit that the testimony clearly indicates that respondent was employed under an oral contract in order to accomplish an unusual assignment for appellant. First he was to open a new territory, and if he were then successful, he was to become supervisor of the Western Region. Once it was established that an oral contract of employment had been agreed upon, all evidence regarding the customary practices of appellant was immaterial. See the case of Wade vs. Ford Motor Company, 151 Kan. 425, 99 Pac. (2nd) 775, where the Supreme Court of Kansas held that provisions of a customary agency contract in writing are no defense to an action based on an oral contract.

Aside from this general rule it is worth noting that although appellant seeks to justify his failure to account because the claim does not conform to his usual business practices, he did not make the payments to respondent in the usual manner. Mr. Barton testified that every salesman received $75.00 a week base pay and commission over and above this amount which would be paid at the end of the month. Respondent, however, was paid a straight 5 per cent commission and at no

time received $75.00 per week, but on the contrary was obligated to spend far in excess of this alleged amount as traveling expenses. If appellant had considered that Hinkson was just another salesman-employee, this fact could have been brought to respondent's attention by paying him weekly as was customary. Everything points to the fact that this was an unusual contract, that both parties knew that it was, and both parties expected it to work out more advantageously than the usual factory-traveling salesman arrangement. Therefore, all the evidence in regard to the usual procedure should have been excluded.

SUMMARY

Based upon the testimony and the rules of Law it is clear that no reversible error was committed by the Lower Court in admitting all of the testimony of the statements of the agent. The authority of Barton as an agent having been duly established the Court was justified in allowing proof of his statements made in the apparent scope of his authority. The limits of the agent's authority were not to be determined by the instructions of his principal in New Jersey but by the statements he made, the reliance placed upon these statements by respondent, and the acquiesances and ratifications of the principal.

The Lower Court was not and should not have been concerned with the general practice of the appellant and his other agency contracts. The only point at

issue was one particular oral contract involving out of the ordinary transactions.

There was substantial evidence sufficient to sustain the Lower Court's finding on all points at issue. Accordingly the judgment of the Lower Court should be affirmed.

Respectfully submitted,

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